



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**NATIONAL VEHICLE AND FUEL EMISSIONS LABORATORY**  
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MAY 09 2001

OFFICE OF  
AIR AND RADIATION

MEMORANDUM

SUBJECT: Application of 40 CFR 93.104(e) to Houston Attainment SIP

FROM: Robert Larson *Lucie Audette /for*  
Acting Director, Transportation and Regional Programs Division  
Office of Transportation and Air Quality

TO: Rebecca Weber  
Associate Director, Multi-media, Planning, and Permitting Division  
EPA Region VI

This memorandum further clarifies EPA's position earlier articulated in the April 23, 2001, memo on the same topics. We are providing it to respond to requests for additional clarification regarding what happens in the event that we find budgets from a submitted SIP inadequate. This memo reiterates facts we clarified in the April 23, 2001, memo so that all relevant issues are addressed in one place.

This memorandum responds to a request from EPA Region VI for clarification of section 93.104(e) of the Clean Air Act transportation conformity regulations (40 CFR parts 51 and 93) and the corresponding provision of the federally-approved Texas conformity SIP. Region 6 has requested this clarification from the Office of Transportation and Air Quality (OTAQ) in the context of the 18-month conformity requirement that was triggered by the ozone SIP revisions that were submitted for Houston in November 1999 and December 2000. The conformity regulations establish triggers for demonstrating conformity following certain state and federal actions relating to State Implementation Plans (SIPs). We have coordinated this memorandum with the Office of General Counsel (OGC).

Section 93.104(e)(2) of the conformity rule requires a conformity determination using the motor vehicle emissions budgets ("budgets") in a submitted SIP within 18 months of a state's submission of an initial SIP to EPA "establishing a motor vehicle emissions budget." However, on March 2, 1999 the United States Court of Appeals overturned certain aspects of EPA's conformity rules, specifically as applicable here, the provision of 40 CFR 93.118(e)(1) that required the budgets in submitted SIPs to be used in conformity determinations 45 days after submission. See Environmental Defense Fund v. EPA, et al., 167 F.3d 641 (D.C. Cir. 1999). The court held that budgets could not be used in conformity determinations unless EPA affirmatively found them to be adequate.

Although the court did not directly address section 93.104(e), EPA has had to interpret this section of the conformity regulations in light of the fact that submitted SIP budgets can no longer be used in conformity determinations where EPA has found such budgets inadequate. OTAQ has advised various EPA regions of its interpretation that in light of the court's decision, where EPA has found the budget in an initial submission of an attainment SIP to be inadequate, the 18-month clock in section 93.104(e)(2) is temporarily stopped.<sup>1</sup> Thus, even if more than 18 months have elapsed since SIP submission, no conformity lapse will occur under section 93.104(e) if EPA has found the budgets in the submitted SIP inadequate prior to the expiration of the 18-month time period. In addition, an inadequacy determination for the budgets in the Houston Phase II attainment SIP (submitted to EPA in November of 1999) would not trigger any consequences under section 93.120, including without limitation a conformity freeze under section 93.120(a)(2).

In the case of Houston, a further attainment demonstration SIP was submitted to EPA in December 2000. EPA anticipates that it will not be making a subsequent adequacy determination with respect to the budgets contained in this SIP revision prior to final approval of the SIP, which EPA anticipates will occur in October of this year pursuant to a consent decree in Natural Resources Defense Council, et al. v. Whitman, D.C. District No. 99-2976 (CKK). We understand that Texas is continuing to revise its attainment SIP and anticipates submitting an additional revision to the SIP this summer. Given the short time between submission of the final revisions to the SIP and the date EPA anticipates taking final action on the SIP, EPA is planning to address the adequacy of the attainment budgets in the final rulemaking action on the SIP, rather than acting in advance under EPA's web site adequacy process. See OTAQ's May 14, 1999, memorandum for more information regarding EPA's adequacy process for submitted SIPs with motor vehicle emissions budgets.

When EPA approves a SIP, section 93.104(e)(3) of the conformity rule establishes a separate requirement that conformity be established to the budgets in an approved SIP within 18 months of our SIP approval. OTAQ is now interpreting section 93.104(e) as a whole in the case of the Houston attainment SIP, where EPA does not find the budgets in a revised submission of that attainment SIP to be adequate as a separate action under our web notification adequacy process, but rather finds the budgets adequate only in the context of full approval of the attainment SIP because EPA will be taking final action on the SIP shortly. Under these circumstances, OTAQ concludes that the stopped conformity clock resulting from the inadequacy determination for the November 1999 SIP submission previously established under section 93.104(e)(2) will not start to run again because it has been superceded by the new SIP approval clock under section 93.104(e)(3). Thus, there will only be one 18-month clock that has been

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<sup>1</sup>This results from EPA's interpretation that section 93.104(e)(2) contemplates that the requirement to determine conformity within 18 months of a SIP submission can only be satisfied by a conformity determination using the budgets from the SIP which triggered this requirement in the first place (as well as all other applicable budgets that EPA has approved or found to be adequate). Should EPA's interpretation be overturned by a court as a result of litigation, EPA will work with the State and the MPO in an effort to interpret the rule in light of any court decision to ensure that a lapse situation will not result.

triggered for conformity associated with the budgets in the attainment demonstration in Houston, running from the effective date of EPA's approval of that attainment demonstration. Under these circumstances the area will not be obligated to meet the conformity clock for the SIP submitted in November 1999 under section 93.104(e)(2), since there will be no adequate attainment budgets available for conformity purposes prior to EPA's approval action.

It is important to note that, should the budgets in the Houston Phase II attainment demonstration (submitted to EPA in November 1999) be determined inadequate, the region would still be subject to the budget test prior to approval of the budgets in the December 2000 and later SIP revisions. Specifically, such an inadequacy determination would not require use of the emission reduction conformity tests in section 93.119 under section 93.118(e)(2), section 93.109(c)(2)(i) or any other provision of EPA's rules. The budget test would apply in the following way: until such time as EPA takes final action approving the Houston attainment SIP, any conformity determinations made in Houston would have to conform to the applicable budgets. The 9-percent rate-of-progress (ROP) SIP established budgets for 1999, which were found adequate on November 1, 1999, and will be approved shortly. If the budgets in the Houston Phase II attainment SIP (submitted to EPA in November 1999) are determined to be inadequate, the 1999 ROP budgets would be the applicable budgets for subsequent conformity determinations until replaced by subsequent budgets in accordance with section 93.118. Specifically, the 1999 ROP budgets would be considered the previously established budgets for purposes of section 93.118(e)(2) and would be considered the budgets for the most recent prior year for purposes of section 93.118(b)(1)(ii).

In addition, ROP budgets for Houston were submitted for 2002, 2005, and 2007 in the December 2000 SIP revision, and additional budgets may be submitted prior to final action by EPA on these SIP submissions. Should EPA find these budgets adequate or approve the SIPs containing these budgets, they would become the applicable budgets for any future conformity determinations until replaced by subsequent budgets in accordance with section 93.118. Finally, we note that conformity in Houston must be demonstrated to the 2002, 2005, and 2007 ROP budgets, if we approve or find them adequate, by June 2002 under the current conformity rule. Any conformity determination made by June 2002 would have to demonstrate conformity to all budgets that EPA has approved or found adequate by that date. This conformity determination is necessary as a result of section 93.104(e)(2), which requires a conformity determination within 18 months of a SIP submission using the budgets from that submission as well as any other budgets that EPA has approved or found adequate. The ROP budgets were contained in an initial SIP submitted to EPA in December of 2000, and thus the 18-month period would end in June 2002 under our current rule.

OTAQ currently anticipates that we will be amending the transportation conformity rule shortly to reconcile these timing issues resulting from the March 2, 1999 court decision. This amendment will codify the court's decision that budgets can only be used in conformity determinations once EPA has affirmatively found them adequate. EPA believes that this rulemaking will continue to support situations such as Houston in that they will have a full 18-month period to demonstrate conformity after budgets have been found adequate, through either EPA's adequacy process or through the SIP approval process.

I trust that this memorandum clarifies our interpretation of 40 CFR 93.104(e) as applicable to the Houston ozone attainment SIP. Should you have any further questions on this matter, feel free to contact Laura Berry of my staff ((734) 214-4858) or Sara Schneeberg of OGC ((202) 564-5592).